JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

Law Sie Hoe v The Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–342–12 OF 2011

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AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA

1 APRIL 2014

Evidence — Identification evidence — Accused, of — Whether accused same person earlier seen by police carrying dark blue bag before running into house — Whether police officers earlier saw accused's face at reasonably close distance in broad daylight and recognised him — Whether description of man carrying bag used by police to locate accused in top floor room of house — Whether accused stood on bag whilst police searched premises — Whether accused failed to explain reason for standing on bag and for conduct at material time — Whether trial judge correct to hold accused had actual possession of drugs in bag — Whether accused failed to rebut presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952

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The High Court convicted the appellant on a first charge of trafficking in 562.85g of cannabis and a second charge of possession of 0.46g of methamphetamine. The appellant was sentenced to death on the first charge and to three months' jail on the second charge. According to the prosecution's evidence, two policemen, PW2 and PW4, on patrol duty saw the appellant at a road side with a dark blue bag (P12) slung over his shoulder. When they approached him he ran into a house. After calling for back up from other police officers, the police party entered the house. A lady carrying a child on the ground floor of the house told the policemen when questioned that the man carrying P12 stayed in the far right room on the first floor. The policemen knocked on the room door several times before the appellant opened it to let them in. They searched the room and noticed that the appellant appeared frightened and was standing on P12 in the middle of the room. The police party found the drugs which were the subject matter of the charges inside P12. The prosecution relied upon s 37(da) of the Dangerous Drugs Act 1952 ('the DDA') to presume the appellant was trafficking in the cannabis. At the end of the prosecution's case, the trial judge found the prosecution had proven a prima facie case and called for the appellant's defence to the two charges. The appellant denied any knowledge of the drugs and contended they must have been placed in P12 by the third parties. The High Court held the defence to be an afterthought as it was only brought up during the defence's stage of the trial. Holding that the appellant had failed to raise a reasonable doubt on the prosecution's case, the court convicted him on both charges. In the instant appeal, the appellant contended, inter alia, that: (a) the prosecution's failure to produce a light orange t-shirt which PW2 testified the man carrying P12 on the

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JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

roadside was wearing raised a doubt whether he was the same person PW2 and PW4 had seen carrying P12 on the road; (b) there was a break in the chain of evidence with regard to the drug exhibits; and (c) because the room occupied by the appellant could not be locked from the outside and was accessible to others, anyone could have placed P12 in the room and hence the prosecution failed to prove the appellant had exclusive possession of the drugs.

Held, dismissing the appeal and affirming the convictions and sentences:

(1) In the absence of any other distinctive feature(s), the issue of the light orange t-shirt might have been instrumental, but not in the circumstances of the instant case. PW2 and PW4 testified that they saw the appellant's face when he was at the roadside in broad daylight from a distance of about 40 feet. They recognised him as the person who was carrying P12. They were also told by the lady in the house when questioned that the man with such a bag stayed in the far right room upstairs and the police party when searching the room saw the appellant standing on such a bag. In the circumstances, there was no doubt the appellant was the same person PW2 and PW4 had seen at the roadside with P12 over his shoulder (see paras 25–27).

(2) The trial judge was correct in finding the appellant had actual possession of the drugs; it was not presumed possession under s 37(d) of the DDA. The prosecution had clearly established that the appellant had physical possession of P12 which contained the impugned drugs. He was standing on the bag in the middle of the room when the police party was searching the room. No one else was in the room at the time. There was evidence the appellant looked frightened. The appellant did not deny he was standing on the bag at the time and he did not explain why he did so nor the reason for his conduct at the time (see paras 31–32 & 35–36).

(3) The evidence did not show any doubt as to the identity of the exhibits that were produced at the trial and no error was committed by the trial judge in holding there was no break in the chain of evidence with regard to the exhibits (see paras 37–38, 40 & 45).

(4) The appellant failed to adduce evidence to rebut the presumption of trafficking. He merely denied possession. On the totality of the evidence and the appreciation of it by the trial judge, the appellant's conviction on both charges was safe (see paras 57 & 59).

[Bahasa Malaysia summary

Mahkamah Tinggi telah mensabitkan perayu atas pertuduhan pertama kerana mengedar kanabis seberat 562.85g dan pertuduhan kedua kerana memiliki methamphetamine seberat 0.46g. Perayu telah dihukum mati atas pertuduhan pertama dan tiga bulan penjara atas pertuduhan kedua. Menurut keterangan pendakwaan, dua orang polis, PW2 dan PW4, semasa bertugas membuat

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

rondaan telah melihat perayu di tepi jalan dengan beg biru gelap (P12) di bahunya. Apabila mereka mendekatinya dia telah lari ke dalam sebuah rumah. Selepas memanggil untuk bantuan pegawai polis lain, pasukan polis telah masuk ke dalam rumah itu. Seorang wanita mendukung bayi di tingkat bawah rumah itu memberitahu polis semasa disoal bahawa lelaki yang membawa P12 itu tinggal di bilik hujung sebelah kanan di tingkat bawah itu. Polis telah mengetuk pintu bilik itu beberapa kali sebelum perayu membukanya untuk membiarkan mereka masuk. Mereka telah menggeledah bilik itu dan mendapati perayu kelihatan takut dan berdiri di atas P12 di tengah bilik itu. Pasukan polis mendapati dadah itu yang merupakan hal perkara pertuduhan-pertuduhan dalam P12. Pendakwaan bergantung kepada s 37(da) Akta Dadah Berbahaya 1952 ('ADB') untuk membuat andaian perayu pengedar kanabis. Di akhir kes pendakwaan, hakim perbicaraan mendapati pendakwaan telah membuktikan kes prima facie dan memanggil untuk pembelaan perayu terhadap dua pertuduhan itu. Perayu menafikan apa-apa pengetahuan tentang dadah itu dan berhujah ia mungkin telah diletakkan di dalam P12 oleh pihak ketiga. Mahkamah Tinggi memutuskan pembelaan itu suatu yang telah difikirkan kemudian kerana ia hanya dikemukakan semasa peringkat perbicaraan pembelaan. Dengan memutusakan bahawa perayu telah gagal untuk menimbulkan keraguan munasabah atas kes pendakwaan, mahkamah telah mensabitkannya atas kedua-dua pertuduhan. Dalam rayuan ini, perayu berhujah, antara lain, bahawa: (a) kegagalan pendakwaan untuk mengemukakan kemeja-t jingga muda yang mana PW2 telah memberi keterangan telah dipakai oleh lelaki yang membawa P12 di tepi jalan itu telah menimbulkan keraguan sama ada dia adalah orang yang sama PW2 dan PW4 telah dilihat membawa P12 di jalan itu; (b) terdapat rantaian keterangan yang terputus berhubung ekshibit-ekshibit dadah; dan (c) kerana bilik itu diduduki oleh perayu tidak boleh dikunci daripada luar dan mudah diakses oleh orang lain, sesiapa boleh meletakkan P12 di dalam bilik itu dan justeru pendakwaan telah gagal untuk membuktikan perayu mempunyai milikan eksklusif ke atas dadah itu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tanpa apa-apa ciri-ciri terperinci yang lain, isu kemeja-t jingga muda mungkin memainkan peranan penting, tetapi bukan dalam keadaan kes ini. PW2 dan PW4 telah memberi keterangan bahawa mereka telah melihat muka perayu semasa dia di tepi jalan pada waktu siang dari jarak lebih kurang 40 kaki. Mereka mengenalinya sebagai orang yang membawa P12. Mereka juga diberitahu oleh wanita dalam rumah itu apabila dia disoal bahawa lelaki dengan beg sebegitu tinggal di bilik paling kanan di tingkat atas dan pasukan polis semasa menggeledah bilik itu melihat perayu berdiri di atas beg tersebut. Dalam keadaan berikut, tidak syak lagi bahawa perayu adalah orang yang PW2 dan PW4 lihat di tepi jalan dengan P12 di bahunya (lihat perenggan 25–27).

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

(2) Hakim perbicaraan adalah betul kerana mendapati perayu mempunyai milikan sebenar dadah itu; ia bukan andaian milikan di bawah s 37(d) ADB. Pendakwaan jelas telah membuktikan bahawa perayu mempunyai milikan fizikal P12 yang mengandungi dadah yang dipersoalkan. Dia telah berdiri atas beg itu di tengah bilik itu semasa pasukan polis menggeledah bilik itu. Tiada sesiapa berada di dalam bilik itu pada masa tersebut. Terdapat keterangan yang mana perayu kelihatan takut. Perayu tidak menafikan yang dia berdiri di atas beg itu pada masa itu dan dia tidak menjelaskan kenapa dia berbuat demikian ataupun sebab kelakuannya sebegitu pada masa itu (lihat perenggan 31–32 & 35–36).

(3) Keterangan tidak menunjukkan apa-apa keraguan berhubung identiti ekshibit-ekshibit yang dikemukakan semasa perbicaraan dan tiada kekhilafan telah dilakukan oleh hakim perbicaraan dalam memutuskan terdapat rantaian keterangan yang terputus berhubung ekshibit-ekshibit itu (lihat perenggan 37–38, 40 & 45).

(4) Perayu telah gagal untuk mengemukakan keterangan untuk mematahkan andaian pengedaran. Dia hanya menafikan milikan. Atas keseluruhan keterangan dan pemahamannya oleh hakim perbicaraan, sabitan perayu atas kedua-dua pertuduhan adalah selamat (lihat perenggan 57 & 59).]

Notes

For cases on accused of identification evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2059–2064.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 MLRA 1, FC (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Ma'arif [1969] 2 MLJ 65 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
R v Warner [1969] 2 AC 256, HL (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54 (folld)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

Legislation referred to

Evidence Act 1950 s 8
Dangerous Drugs Act 1952 ss 37(d), (da), 39B

Appeal from: Criminal Trial No 45–05 of 2009 (MR) (High Court, Miri)

Ranbir Singh Singh (Ranbir Singh & Co) for the appellant.
Musli bin Abdul Hamid (Deputy Public Prosecutor Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

[1] In the High Court, the appellant had been charged for two offences under the Dangerous Drugs Act 1952 ('the DDA 1952'). The appellant was charged as follows:

[2] First charge:

> That you, on the 19th day of April, 2009 at about 1600 hrs, at No 31 Taman Gilbert, Miri, in the District of Miri, in the State of Sarawak, on your behalf, did traffic in the dangerous drugs, to wit, 701.81 grammes Cannabis and that you thereby committed an offence under section 39B(1)(a) of the DDA, 1952 punishable under section 39B(2) of the same Act.

[3] Second charge:

> That you, on the 19th day of April, 2009 at about 1600 hrs, at No 31 Taman Gilbert, Miri, in the District of Miri, in the State of Sarawak, on your behalf, did have in your possession dangerous drugs, to wit, 0.46 grammes Methamphetamine and that you thereby committed an offence under section 12(2) of DDA, 1952 punishable under section 12(3) of the same Act.

[4] The prosecution in its opening statement informed the court below that the prosecution would prove that the 701.81g of cannabis and 0.46g of methamphetamine were in the possession of the appellant on 19 April 2009 at about 4pm at No 31, Taman Gilbert, Miri, Sarawak and that the appellant had knowledge of the drugs which were in his possession.

[5] The prosecution stated that it would rely on the presumption under s 37(da) of the DDA 1952 to prove that the appellant did traffic in the drugs.

[6] At the end of the case for the prosecution, the learned trial judge had subjected the evidence as led before him to the maximum evaluation as required of him under the law as decided in the cases of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, *Public Prosecutor v*

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457 and had come to the decision that the prosecution had succeeded in establishing a prima facie case against the appellant on both charges, having prior amended the first charge with a reduced amount but still sufficiently substantial to attract a trafficking charge nevertheless. The learned trial judge had then called for the appellant to enter on his defence to both the charges. The appellant had elected to give evidence under oath and called witnesses. Having considered the defence in the context of the evidence led in the whole case, the learned trial judge had found the appellant guilty on both the charges and convicted him accordingly, and after hearing the plea in mitigation, had then sentenced him to the death sentence for the amended first charge and to three months imprisonment for the second charge.

[7] The appellant had since lodged a notice of appeal against the said convictions and sentences that were imposed on him by the learned trial judge. We had heard his appeal and had dismissed the same. We now give our reasons for having done so.

[8] First, the facts of the case may be stated as follows: On 19 April 2009 at about 4pm, Sgt Ahia ak Amit ('PW2') and L/Cpl Rulan ak Jayah ('PW4') were patrolling at Taman Gilbert, Miri in a mobile police vehicle ('MPV'). They said they saw a Chinese male whom they later identified as the appellant in this case at the road side carrying a dark blue bag slung on his right shoulder. When they approached him in the MPV, they said the appellant had run into a house at No 31, Taman Gilbert, Miri.

[9] PW2 and PW4 did not immediately go into the said house but instead had waited outside the house for reinforcement to come before doing so. When the reinforcement did come a few minutes later, they all went into the house No 33 after a briefing given by PW2. Among the reinforcement party was Constable Ranjiv. As they entered the living area inside the house on the ground floor they saw a lady with a child in her arms. The police party asked this lady whether she had seen a Chinese male carrying a dark blue bag and she told the police party that the man was staying in the far right room on the first floor. The police party went upstairs and knocked on the door of the room.

[10] PW2 said that when the police knocked on the door to the room, they called out that they were police officers. After the police knocked on the door several times, the appellant opened the door slightly. According to PW2 and PW4 the appellant was the same person whom they had earlier minutes seen at the roadside with a dark blue bag slung on his right shoulder. The police pushed the door open and went inside the room and according to PW2 and PW4 the appellant had looked scared and was shivering. PW2 instructed the police party to search the room. During the search, PW4 found a CSL brand

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

hand phone and a silver digital weighing machine. These were later on tendered and marked in court as exhs P16(A) and P17(A) respectively. A

[11] During the search in the said room, PW2 said he saw the appellant was standing on a dark blue bag. PW2 asked the accused to hand over the bag to him. PW2 examined the bag and found three square pieces of compressed lumps wrapped with what he described as yellow sellotape which he suspected to be 'ganja', 11 transparent plastic packets containing dried leaves which he suspected to be 'ganja' and one transparent plastic packet containing crystalline substance which he suspected to be 'syabu'. PW2 put all the items back into the dark blue bag. B C

[12] PW2 instructed Const Ranjiv to conduct a body search on the appellant. Const Ranjiv found cash money amounting to RM5,000 from the front right pocket of the denim shorts worn by the appellant. Const Ranjiv also found a black wallet. The cash and wallet were given to PW2 who put these two items inside the dark blue bag. D

[13] The appellant was arrested and together with the seized items, was brought to Central Police Station, Miri. The appellant was together with PW2, PW4 and Const Ranjiv in one MPV while the other two police personnel were in another MPV. PW2, PW4, Const Ranjiv and the appellant arrived at CPS Miri at about 6.30pm and they proceeded to the inquiry room. PW2 contacted Insp Saini ('PW10') who was the investigation officer ('the IO') of this case who subsequently came to the inquiry room. In the inquiry room the seized items were marked by the PW2 and subsequently handed over to PW10 together with a handing over note and police report. The PW10 subsequently instructed Lans Koperal Andrew ak Engkok ('PW1') to take photographs of the seized items that were handed over to him by PW2. After that the seized items were packed by PW10 into three separate envelopes which he had marked as G, GG and S. On 27 April 2009 the PW10 went to the Chemistry Department Malaysia in Bintulu and these three envelopes were handed over to the chemist, Abdul Ghani bin Harun ('PW3') for his analysis. PW3 issued an official receipt to PW10 acknowledging such receipt by him of the said envelopes from PW10. E F G H

[14] PW3 had analysed the contents in the three envelopes and he had found the packets contained in the envelopes marked G and GG to contain dried plants which on analysis he had found to be cannabis weighing 701.81g and that in the envelope marked S he had found crystalline substances which on analysis, he had found to be methamphetamine, weighing 0.46g. Both were dangerous drugs as listed under the DDA 1952. PW3 had prepared a chemist report (P8) on his analysis of the items that he had received from the PW10. I

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

[15] Based on that factual matrix, the appellant was charged with two charges (as per reproduced above) before the High Court in Miri where he had claimed trial for both charges.

[16] After hearing the evidence as led by the prosecution, the learned trial judge had, at the end of the prosecution's case, ruled that the prosecution had established a prima face case against the appellant on both charges but he had amended the amount of the cannabis in the first charge under s 39B of the DDA 1952 by subtracting from the total weight of the cannabis of 701.81g an amount of 138.98g, leaving the total weight in the said first charge at 562.85g. The first charge as amended, was read and explained to the appellant and he had maintained the same plea of not guilty to the said amended charge which, by virtue of the amount, though reduced, was still maintained as a charge of trafficking and punishable under s 39B of the DDA 1952. The reason for the reduction in the weight in the first charge will become clear in the later part of this judgment. There was no amendment to the second charge relating to the possession of the methamphetamines. The appellant would have to rebut the presumption of trafficking in the impugned drugs that were found in his physical possession that had been affirmatively established via the evidence of the prosecution witnesses.

[17] The appellant was therefore ordered to enter his defence to both the charges and he had elected to give evidence under oath from the witness stand. His version of how things had unfolded on the fateful day was substantially different from the one that was adduced by the prosecution witnesses. The appellant had called to the stand his partner ('DW3') whose evidence had closely followed what he had testified.

[18] After considering the defence in the context of the whole evidence that was led before him, the learned trial judge had convicted the appellant on both the charges and had sentenced him accordingly on both the said charges.

[19] The appellant was aggrieved by the learned trial judge's decision in whole and he had since filed in the notice of appeal against the decision. Hence, his appeal had come before us. We had listened to and heard both parties in the course of this appeal.

[20] Before us, learned counsel for the appellant had reiterated his contention that the prosecution had not established a prima facie case against the appellant and although there were numerous grounds pleaded by the appellant in the memorandum of appeal, before us, learned counsel had intimated that he would be focusing his appeal on the following areas of concern, namely: (a) issue relating to the identity of the appellant, (b) break in chain of exhibits matter of description of the drugs, (c) that the analysis of the

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

alleged drugs by the chemist PW13 was wrong and that the outcome of the analysis was illogical and (d) that the appellant had no exclusive possession of the impugned drugs. At the end of it all, learned counsel had submitted before us that the findings by the learned trial judge on these issues could not be sustained and that they ought to be rejected by this court with the result that the appellant's recorded convictions on the two charges must of necessity be set aside and that he be acquitted forthwith (without defence having been called) and that if defence was correctly called, that the appellant's version had rebutted the element of possession and presumption of trafficking and that the appellant had raised a reasonable doubt as to his guilt. Differently put, it was submitted for the appellant that the prosecution had failed to prove its case against the appellant beyond reasonable doubt, at the end of the whole case.

[21] Now, we will begin by looking at the issue of the identity of the person concerned with the incident who was charged with the two offences in this case. Learned counsel for the appellant had contended that the person who was seen by Sgt Ahia ak Amit (the PW2) and his colleague L/Kpl Rulan ak Jayah (PW4) by the road side, bringing a dark blue bag slung over his right shoulder at about 4pm on the 19 April 2009 outside the house No 31 Taman Gilbert, Miri and who was later on arrested inside a room upstairs inside the said house was actually not the same person. The basis of the appellant's contention had been that the prosecution had failed to produce any evidence in the form of a light orange coloured t-shirt. It was not in dispute that the PW2 had stated in evidence that the appellant was seen wearing a light orange coloured t-shirt when he was seen at the road side who they later observed had run into the said house No 31 Taman Gilbert, Miri when they had approached him in their MPV. Such failure on the part of the prosecution to produce such evidence had therefore raised a reasonable doubt as regards the identity of the appellant as the person who was seen by PW2 and PW4 at the road side at the material time.

[22] They did not immediately follow the person into the said house but had stopped their MPV in front of the said house and proceeded to call for reinforcement. When the other MPV had arrived about five minutes later, PW2 and his police party then went into the said house to look for the said person they had seen by the road side earlier on. Upon entering the house, they saw a woman with a child in her hands and the police party asked her whether she had seen a Chinese man carrying a dark blue bag. They were told by this woman that the person so described was staying in the far right room on the first floor of the said house. The police party led by PW2 then went upstairs and went on to knock on the door of the said room a few times while identifying themselves as police officers. The door was locked from inside and it was later slightly opened from inside by the appellant. The police party had then pushed it wide open. Once they were inside the room while doing a search, they saw the appellant was standing on a dark blue bag and that he was wearing a pair of

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

denim shorts and that he was not wearing any shirt. It was also in evidence that the appellant had looked scared and nervous and was seen shivering. The PW2 then asked the appellant to hand over to him the dark blue bag on which the appellant was standing. On the bag being handed over to him by the appellant, PW2 had then examined the dark blue bag and had found it to contain the impugned drugs that would subsequently be the subject matter of the two charges that were preferred against the appellant in this case. The appellant was then arrested and all the seized items were brought back to the Miri Central Police Station. The appellant and PW2 (together with the seized items) went in the same MPV to the Miri Central Police Station. At the station, a seizure list and a handing over list were prepared and from these lists there was no mention of any light coloured orange t-shirt as having been seized from the appellant.

[23] As alluded to earlier, the absence of the light coloured orange t-shirt was pounced upon by the learned counsel for the appellant to drive home the point that a doubt had been created as to the identity of the person who was seen by PW2 and PW4 by the roadside outside the house No 31 Taman Gilbert, Miri before he was seen running inside the said house.

[24] After considering the evidence on this matter, learned trial judge had postulated the question to be 'whether the Appellant had been positively identified by PW2 and PW4 as the person they saw at the roadside and subsequently in the room at no. 31, Taman Gilbert. Apart from the cross-examination on the light orange T-shirt, they were not seriously challenged on their identification of the Appellant.' It was also observed by the learned trial judge that a person is not identified only by the colour of the shirt worn by him at the material time.

[25] With respect, we agree with him. In the absence of any other distinctive feature(s), the issue on the light orange colour t-shirt may be instrumental, but not in the circumstances of this case. We say this because of the existence of other evidence such as the appellant was recognised by PW2 and PW4 'as the person who with the dark blue bag at the road side of the road.' This was the finding made by the learned trial judge at p 293 of the ROA. Further, there was the evidence on the dark blue bag. PW2 and PW4 had testified that they saw the person at the roadside had a dark blue bag slung over his right shoulder, the woman with a child in the house No 31 had told them that a Chinese man with such a bag was staying in the room upstairs and that inside the said room, when it was being searched by the police party, the appellant was seen standing on a dark blue bag. After alluding to this chain of events, the learned trial judge had made the following conclusion:

> This would link the Chinese male they saw at the road side with a dark blue bag slung on his right shoulder, to the Chinese male carrying a dark blue bag pointed out by the lady with the child when asked by the police in the living room as

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

described by this lady. When the police knocked on the door it, was the accused who opened the door which was locked from inside.

[26] On top of that, the appellant was seen and observed by the PW2 and PW4 in broad daylight, at about 4pm from about 40 feet on that day. It must be noted that two eyewitnesses had seen him, not just one. The learned trial judge had observed correctly when he said that 'Their identification of the accused was made in broad daylight from a distance of about 40ft' (at p 293 of the ROA). We find that the learned trial judge had come to the correct finding on this issue on the identification of the appellant. There is no doubt as to the identity of the appellant. He was the person seen by PW2 and PW4 at the road side with the dark blue bag over his right shoulder at the material time.

[27] In fact, PW2 had testified during trial in answer to the question by the learned DPP as follows, at p 90 of the ROA:

Q: How can you be so sure that the Chinese man at the road side and the Chinese man that you arrested inside a room at Lot 31, Taman Gilbert, Miri is the same person?

A: 'I can recognise him from his face'. The basis for his ability to recognise the Appellant's face appears at page 117 of the ROA in his answer to a question by the learned counsel during cross-examination: 'Since his back was towards you, you would not have been able to see his face, do you agree? A: 'I saw his face before he ran towards the house.' It is also in evidence that PW4 had said, at page 156 of the ROA during re-examination, as follows:

Q: What made you recognise the accused person as the one who run away from you and Sgt Ahia and entered the house lot no. 31, Taman Gilbert?

A: Because I can see his face clearly.'

Based on the above, we find no merit in this issue regarding the identity of the appellant in relation to absence of light orange coloured t-shirt being produced by the prosecution.

[28] As regards the issue of possession, we find that it would be helpful to reiterate the underlying principle in play in cases such as the present appeal, which is that possession to be an incriminating act must contain three characteristics. First, the person in possession must have knowledge of the thing in his possession. Secondly, he must have in him a power of disposal over the thing and thirdly, he must be conscious of the possession of the thing. We noted that the learned trial judge had alluded his mind correctly on this legal point. The case of *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54 is the authority for that legal proposition that had been followed ever since. In that case, it was held by the court, in the speech by the learned Justice

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

Gordon-Smith, AG C J that:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal

[29] Before us, learned counsel for the appellant that contended that the prosecution had failed to prove that the appellant had possession of the impugned drugs that were found in the dark blue bag that had since been seized and tendered and marked as prosecution exh P12 in the course of the trial before the learned judge. Essentially, that contention was premised upon three factual assertions. One, it would flow from the assertion by the appellant that he was not the person whom the police witnesses had said they saw on the road side outside the house. Two, that the room upstairs which was rented to the appellant was also accessible to other people apart from the appellant himself. It was in evidence that the woman with the child were also staying with the appellant in that room. Three, it was also in evidence that the door to the said room could not be locked from outside, so there was always the possibility that other people could enter the room when the appellant was not in the room. The inescapable conclusion therefore that learned counsel had wanted us to draw from such a submission along this line must be that there was no exclusivity to the room upstairs, since others could have access to it as well. The dark blue bag could therefore have been placed in the room by someone else other than by the appellant.

[30] From the manner in which the issue of possession was articulated, it would appear that the appellant had nothing to do with the drugs that were found in the dark blue bag. In the court below, the learned trial judge had not agreed with the contention of the appellant and his finding on the issue of possession can be seen at p 310 of the ROA where he had, after subjecting the evidence to the applicable law, had said:

> *From the evidence adduced, I find that the accused was in possession of the drugs*. Before us, the Appellant had through his learned counsel submitted otherwise and said that he ought not to have been ordered to enter on his defence to the 2 charges.
>
> (Emphasis added.)

[31] We had considered this ground of appeal by the appellant on the issue of possession in the light of the evidence adduced. The drugs were found in the dark blue bag when it was examined by PW2 inside the room upstairs in house No 31 Taman Gilbert, in the presence of the appellant. The appellant was seen immediately prior to that standing on the said bag in the middle of the room. Nobody else was in the room at the time when the police party came into it in search of the appellant, except the appellant himself. Before that, the woman

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

carrying a child, in the living area on the ground floor in the said house had told the police party of the room upstairs where the Chinese male with a dark blue bag was staying in the said house. A few minutes before that, the police party had observed the appellant at the roadside with a dark blue bag slung on his right shoulder and had run away from them upon being approached by the police in the MPV. He was seen running into the house No 31 Taman Gilbert, Miri. On top of that, he was seen by PW2 and PW4 to be scared when he opened the door of the room upstairs from inside after the police party had knocked on the door and identified themselves as police officers. He was also seen standing on the dark blue bag in the room when the police party were carrying out a search.

[32] From the above, the appellant clearly had physical possession of the dark blue bag from inside which the impugned drugs were found. The physical nexus was clearly established by the evidence led by the prosecution. In the case of *R v Warner* [1969] 2 AC 256 this is what Lord Wilberforce had said, as found at p 312: 'In all such cases, the starting point will be the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is a genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain, or such guilty knowledge with regard to it as to make up the statutory possession.' In other words, the appellant in this case being so situated in relation to the dark blue bag owes an explanation to show that it was all innocent, and that there was nothing sinister about it, as far as he was concerned. It is noted that the appellant never denied categorically the assertion by the PW2 that he was seen standing on the dark blue bag while the police was doing a search in the room. At the same time, there was no explanation coming from him why he had stood on the dark blue bag the way he did. If indeed the dark blue bag had contained his laptop, why did he have to step on it? As Lord Wilberforce had said in *Warner*'s case a person so situated would need to come up with an explanation. No explanation was forthcoming from the appellant in this case.

[33] From the above too, there was also the element of conduct in play on the part of the appellant. In appropriate cases, strong inference of knowledge on the part of an accused person may justifiably be drawn from his conduct as observed by a prosecution witness. Learned Justice Augustine Paul FCJ in the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 having acknowledged that proof of knowledge is very often a matter of inference, had gone on to state the law on conduct under s 8 of the Evidence Act 1950 ('the EA') where His Lordship had said:

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

A The degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand, conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any B other explanation for the conduct or draw inferences of its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9 EA.

[34] In the case of *Parlan bin Dadeh* the evidence against the appellant had been that he had looked stunned and shocked when the police approached C him. The apex court had ruled that in such circumstance and on the facts, the evidence of such conduct on the part of the appellant must be admissible 'since it had a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him.' It went on to say that it was therefore incumbent on the appellant there to offer an explanation for his reaction as D required by s 9 of the EA.

[35] In the case before us, there was no explanation forthcoming from the appellant as he had denied such conduct attributed to him. As the learned trial E judge had held the evidence emanating from prosecution witnesses to be credible, the absence of any explanation by the appellant pertaining to his impugned conduct in this case, such conduct could therefore be used as evidence to infer against him to the effect that, in the light of the other attendant evidence as led in this case, he knew what was contained in the dark F blue bag (P12) that he was seen standing on in the room upstairs and which he slung on his right shoulder at the roadside earlier in the evening on that fateful day.

[36] Premised on the above, with respect, we found that the learned trial G judge was correct in coming to his conclusion on possession of the drugs as having been established against the appellant in this case. This was an affirmative finding of possession, not one that was presumed, under s 37(d) of the DDA 1952.

H **[37]** As regards the issue of break in chain of the exhibits, it was contended by learned counsel for the appellant that there was a doubt as to the identity of the exhibits that were produced at the trial.

[38] This court, having considered the submissions put forth by both I parties, would respectfully agree with the learned Mr deputy that there was no break in the chain of exhibits. It must be noted that all the witnesses who had put their markings on the respective exhibits had positively identified their markings in court to be theirs. Similarly on the issue of the colour of the masking tapes that pertained to the three slabs marked as G1, G2 and G3 there

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

seemed to be a contradiction on the testimony of witnesses on the colour of the tapes used. Some said it was yellow while some said it was light brown. But we think that the learned trial judge had correctly dealt with the matter when he ruled that it all boiled down to the matter of description and perception. Different people could describe a same item differently as regards the colour of the item and invariably it would ultimately depend on how different people would perceive that said item. In this case the witnesses for the prosecution had described the colour of the tapes differently but they were consistent in their testimony that the exhibits were the very exhibits that they were concerned with in this case. Above all else, the distinguishing features have been that their respective markings were on the very exhibits that the appellant was now challenging. This court is also guided in that regard by the recent decision of the apex court in the case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 MLRA 1 where the learned Justice Raus Sharif PCA had, on behalf of the apex court in dismissing an appeal, ruled on a point involving the issue of the break in chain of evidence, that was not much dissimilar from the one now being considered before us. We will deal with this later on in this judgment.

[39] With regard to the exhibits also, it was contended on behalf of the appellant that there could have been a mix up of the exhibits as there was an arrest of another suspect at another place by the police, while on the way back from the house No 31 Taman Gilbert to the Miri Central Police Station. But the evidence of PW2 in that regard was clear in that granted that there was such a subsequent arrest, he was not involved at all in that arrest. He had remained in the same MPV together with the appellant and that the seized suspected drugs from the appellant were in his custody all of the time until they were marked by him and were handed over to the investigating officer, PW10 at the Miri Central Police Station later in the evening the same day.

[40] The learned trial judge who had heard and observed the prosecution witnesses before him had found their testimonies to be credible and that there was no reason why he should doubt their evidence. As long as their evidence had remained intact, the learned trial judge was justified in accepting their evidence on the chain of exhibits. We find that the learned trial judge did not err in that regard.

[41] As regards the issue on the 'balance' of the plant materials found in the 11 plastic packets (marked as G4–G14) the learned trial judge had disregarded the amount of 138.96g, namely the total contents of the said 11 plastic packets from the amount stated in the first charge (relating to the cannabis), as the chemist PW3 had failed to account for the balance from the analysis. We are of the view that he had done the right thing as the doubt on the weight ought to be resolved in favour of the appellant. While it had impacted on the weight, the

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

same did not impact in any way on the identity of the drugs. The PW3 had positively identified the drug exhibits in court as the very same drugs that he had analysed in his laboratory. What had happened in the trial had been that the chemist had said that he had weighed all the plant materials that he had gathered from all the packets marked G4–G14 and that the total weight that he obtained there from was 138.96g. He then went on to state that he had used up all of these plant materials for his analysis. After the analysis, he had put back the 'balance' into the plastic packets. He had identified these plastic packets in court before the trial judge. At trial, learned counsel had latched on the word 'balance' to contradict the chemist (PW3) who had said that he had made use of all 138.96g of the plant materials for his analysis. His logic was simple, if you had used all the 138.96g, where did the 'balance come from?' and what was the weight of the balance? The chemist was not able to explain away this apparent discrepancy. The learned trial judge had resolved this in favour of the appellant by ignoring total amount of 138.96g from the weight stated in the first charge. We are of the view that the learned trial judge did not err in doing so.

[42] For good measure, learned counsel had also contended that the chemist did not comply with the dictates of the provisions of s 37(j) of the DDA 1952 when he undertook to conduct the analysis of the plant materials and the crystalline substances which were seized from the dark blue bag seized from the appellant. Suffice for us to say here that the learned trial judge had dealt with that issue admirably in coming to his conclusion on the issue on the application of s 37(j) of the DDA 1952, when he concluded; '36. Section 37(j) provides that where any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be suffcient to analyse samples of the contents of a number not less than 10% of such receptacles. The key words in this provision refer to the 10% of such receptacles ie where there are many receptacles seized, samples must be taken from not less than 10% of such receptacles for analysis. This provision is not concerned with the quantity of the drugs to be analysed. That is left to the chemist who carries out the tests to determine what is the adequate quantity that should be taken as samples for the purpose of carrying out the test' (see p 303 of the ROA). Clearly, on the evidence, the chemist had done more than was required of him under s 37(j) of the DDA 1952. On account of the appreciation of the evidence as led before him, we find that his conclusion that the chemist had complied with s 37(j) was justified and we find no further need to dwell at great length on that issue. Indeed the decision in *Gunalan all Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551 is clear in that regard. As to the issue of whether one of the three slabs was cut open as alleged by learned counsel based on his observation from the photographs, the evidence of the chemist PW3, who was the last person to receive it from the PW10 (the investigating officer) was emphatic when he testified that all the exhibits that he had received from the PW10 were intact. That would put paid to learned counsel's submission in that regard.

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

[43] It did not escape our attention that the learned trial judge had said that the PW10 did not weigh the impugned drugs seized by the PW2 and that only PW3, the chemist did the weighing of the same. From the evidence of PW10, he had said that he had weighed the drug exhibits after he had received them from the PW2 and before he sent them to the chemist, PW3 for the latter's analysis on the same. He had testified that the gross weight of the items marked G1, G2, G3 and G4 to G14 (suspected cannabis) was 751g and that the gross weight of the item marked S1 (suspected 'shabu') was 0.95g. As the learned Justice Abdul Hamid J (as he then was) had said in the case of *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65:

> An appeal is merely a continuation of a trial and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct.

[44] So, as an appeal forum, we are entitled to consider the evidence as led in this case on the issue. In so doing, we noted that the chemist PW3 in his evidence had stated that the total gross weight of the plastic bags including dried plant materials marked G1,G2 and G3 was 595.94g and that of G4–G14 had amounted to 151g. There would appear to be a discrepancy in the weights recorded by the PW3 and PW10. It would be rather easy to point to a break in the chain of the relevant exhibits on account of such a situation. Indeed, an explanation coming from the prosecution would be desirable. However, in this regard, we would revert to the decision of the apex court in the case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 MLRA 1 to which we had alluded to earlier. In that case, the learned Justice Raus Sharif PCA had occasion to say, at para (21) as follows:

> It is not in dispute in this case that PW6 found the gross weight of the drug exhibits to be 4,860g while PW3 found it to be 4,688.55g. Thus, there was difference of 171.45g. An explanation by the prosecution would have been desirable, but on the facts and circumstances of this case we have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. The difference in the gross weight which is 171.45g less could be due to the fact that the drug exhibits were weighted by PW3 nearly three months after the drug exhibits were weighted by PW6. We take judicial notice that environmental factors such as climate condition and humidity can attribute to the difference in weight if the impugned drug exhibits. Given that there was an interval of nearly three months before the drug exhibits were sent to PW3, we are driven to the conclusion that the drug exhibits being cannabis could have dried up a little and this could be the reason for the lesser weight. At this juncture, we might hasten to also add that the weighting process by the police is not the determining factor in the weight of the drugs, rather it is the weighting done by the chemist which determines the actual weight of the drugs and forms the basis of the charge. It is common knowledge that the weighting process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

inevitable due to different weighting methods preferred and the different weighting apparatus used by the police force and the Chemist Department.

[45] In the circumstances of this case, the witnesses, in particular PW2, PW3 and PW10 who had made markings on the items seized and packed by them had positively identified the exhibits that were tendered during the trial of this case before the learned trial judge as the very same items that had been seized and handled by them at the material times. In light of that, we are of the view that the differences in the gross weight of the seized drugs as found by the relevant witnesses who had weighed them by themselves is not sufficient to create a reasonable doubt to the prosecution case in relation to their identity. In fact, this conclusion was also taken by the learned trial judge on the issue of the break in the chain of exhibits, when he said at pp 302–303 of the ROA as follows:

> what was important was whether there was any break in the chain of evidence in respect of the seizure and custody of the drugs. The evidence showed that PW2 had initialled and written on the exhibits containing the drugs with the marking G1 to G14 and S1 at CPS, Miri. During the trial he had identified these markings and his initials on the exhibits. PW4 and PW10 had also identified the markings and the initials. In addition, PW10 had put these exhibits into three envelopes which he supplied and had labelled them with his own markings and then had them handed to the chemist, PW3 for analysis. After analysis, the exhibits were returned to the police by PW3 in the same envelopes and he only opened them in court during trial. PW10 had identified the envelopes and labels prepared by him. PW3 had also identified these exhibits in court. So did the PW2. From the evidence, notwithstanding the discrepancies referred to above, there was no break in the chain of evidence in the handling, marking and custody of the exhibits marked as G1 to G14 and S1 by the prosecution witnesses from the time the drugs were seized until they were analysed by the chemist. *Gunalan Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, *Thien Teck Soon v Pendakwa Raya* [2011] 4 AMR 173, *Loh Kan Loon v Public Prosecutor* [2011] 3 MLJ 438; [2011] 5 AMR 537.

[46] In the light of his findings which we find to be sound and supported by the evidence, the learned trial judge was correct in concluding that the prosecution had successfully established a prima facie case against the appellant on both the charges which if unrebutted would warrant his convictions. In relation to the first charge involving the cannabis, the presumption of trafficking was invoked and was therefore in play.

[47] In a prosecution for trafficking of drugs under the DDA 1952, the accused at the defence stage will have to deal with the issues of possession and trafficking. Depending on whether or not a statutory presumption is in play, the accused will have to either raise a reasonable doubt or rebut the operation of a presumption against him on the balance of probabilities in order to secure

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

an acquittal. In considering the totality of the defence at the end of the defence case it is incumbent on the trial court to subject the whole evidence in a two tier exercise as stipulated by the learned Justice Mohd Azmi SCJ in the case of *Mohamad Radhi bin Yaacob v Public Prosecutor* [1991] 3 MLJ 169. In this exercise, the mischief to be avoided has been for the trial court *not* to automatically convict an accused person on a trafficking charge just on account that the element of possession of the impugned drugs has been established by the prosecution against the accused person and that the accused person has failed to rebut that element of possession against him whether actual or presumed possession. The fact that the prosecution has succeeded in proving possession against the accused person does not ipso facto tantamount to saying that the prosecution case for trafficking against him has also therefore been established as well. While possession is invariably part and parcel of trafficking and undeniably an important component at that, it is not however, synonymous with trafficking. It is a facet of trafficking but to say that once possession is proven, it must follow that trafficking is also proven is but a grave fallacy. There is more to trafficking than there is to possession. We need only to refer to the decision of the Privy Council in the case of *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 as an initial reference as to what trafficking in drugs entails. In that case the learned lawlord Lord Diplock had occasion to say:

> ... if the quantity of controlled drugs being moved was in excess of the minimum quantity specified for that drug in s 15 of the Act, that section creates a rebuttable presumption that such is the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with the possession of the drugs to anyone else, but to retain them solely for his own consumption

[48] That therefore vindicated the learned Justice Mohd Azmi's call in the *Mohamad Radhi* case for the need for the trial court to ensure that there must be a separate exercise to further determine whether as a matter of fact and law, the element of trafficking had been established by the prosecution after successfully establishing the element of possession. Having established possession, the court will have to further consider whether the possession was with intention of further traffic the drugs possessed. If the trafficking is presumed, it will have to determine whether the defence has rebutted the same on the balance of probabilities.

[49] As such, the duty of the trial court in a trafficking charge does not end once the finding on possession has been made out by the prosecution where the accused person has failed to rebut possession. Rather, it is incumbent on the court to proceed on to look to see whether on the evidence adduced before it the element of trafficking, either presumed or actual, has been established by the prosecution, or conversely, whether the accused person has rebutted the

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

presumed trafficking on the balance of probabilities or created a reasonable doubt on the trafficking circumstance where no presumption was in play in the case. This is what the learned Justice Mohd Azmi had said in the *Mohamad Radhi* case at p 172 of the report: 'Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probability the defence has rebutted the statutory presumptions of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on the balance that the presumption of possession under s 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.' We are of the view that this two tier exercise as enunciated by the learned Justice Mohd Azmi SCJ in the *Mohamad Radhi* case is still good law even though there is now an embargo on the use double presumption against the accused person in the light of the apex court decision in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170. There has to be two separate exercises as the factum of possession and that of trafficking constitutes two separate offences under the DDA 1952. Failure to undertake such an exercise is fatal as it would amount to a serious and material misdirection by the trial court and a conviction so had cannot stand and will of necessity be set aside.

[50] Looking at the defence put forth by the appellant in this case, he had denied having any knowledge of the drugs that were found in the dark blue bag (P12). He had put forth a few theories as to how those drugs could have found their way into the said bag including one that suggested that his first wife could have placed the drugs inside the dark blue bag while he was gaming on his computer and that there could be a possible mix up with subsequent raid on way to Miri Central Police Station. If he succeeded in this line of defence, the need for him to deal with the element of trafficking in the same drugs would have been rendered completely unnecessary, because he would have to be acquitted even of possession, so let alone of trafficking. In the context of a drug trafficking prosecution, proof of possession is a precursor to the proof of trafficking. Without proof of possession, the charge of trafficking would have no proverbial leg to stand on for it to be successful.

[51] The learned trial judge had considered the evidence led by the appellant and in the circumstances, he was of the view that the defence was essentially an afterthought whereby, by and large, what he had told the court in his defence was not put to the relevant prosecution witnesses when the latter were giving evidence in court during the prosecution case during cross-examination by learned counsel. An afterthought defence is one that smacks of recent invention and lacks credibility, not only as regards its truth but also its incapacity to create even a reasonable doubt. The probability of the appellant's defence was tested by looking at the evidence of the woman with a child, namely the DW3. She was the partner of the appellant and had shared the

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

room in which the appellant as arrested while standing on the dark blue bag. The prosecution's case was premised on the factual assertion that the appellant was initially seen at the roadside with a dark blue bag slung over his right shoulder before he was seen running into the house No 31, Taman Gilbert where he was subsequently arrested. When the police party went into the said house PW2 had asked DW3 whether she had seen a man with a dark blue bag slung over his shoulders had come into the house. DW3 had allegedly answered in the affirmative and told him that the said man stayed in a room upstairs at the far right corner of the said house. During the prosecution case, the two witnesses, PW2 and PW4 had testified that they had spoken to DW3 and that it was their evidence that she told them that the male Chinese carrying the dark blue stayed in a room upstairs in the house. In fact, PW4 had said as follows, at p 129 of the ROA:

Q: After the backup came, what happened?

A: Four of us briefed by Sgt Ahia. After the briefing, we all entered lot 31, Taman Gilbert. Sgt Ahia asked one female person who was from Sabah, whether she knew the person who entered the house and carrying the blue bag,

Q: What did the female answer?

A: She said the male person stayed at the 1st floor.

Q: When this female person said the male person stayed at the 1st floor, did she mention in which room this male person was staying?

A: Yes, she said at the corner room.

Q: When this female person informed Sgt Ahia all this information, where was she at the time?

A: At the living area the ground floor.

[52] This incident involving DW3 would appear to have been substantially confirmed by the evidence of DW3 herself when she testified that the police personnel did enter the house and that 'one of them asked me whether a Chinese male stayed in the house. I then asked them why and they told me they received the complaint. Then I pointed to upstairs and I took my child outside the house' (see pp 268–269 of the ROA).

[53] It is pertinent to note that when the PW2 and PW4 asked DW3 about the person they said they saw at the roadside, they did not describe that person as having worn a light orange t-shirt but as a male who carrying a dark blue bag on his shoulder. Again, this goes to show that the identification of the appellant was not based entirely on the fact that he was seen to be wearing a light orange t-shirt.

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

[54] At this juncture, it is noteworthy to look at the finding of the learned trial judge when he said in his grounds of decision as follows, at p 293 of the ROA:

> This would link the Chinese male they saw at the road side with a dark blue bag slung on his right shoulder, to the Chinese male carrying a dark blue bag pointed out by the lady with the child when asked by the police in the living room as described by this lady. When the police knocked on the door it was the accused who opened the door which was locked from inside.

[55] He had said that the evidence of DW3 she saw the Chinese male carrying the dark blue bag on the day in question was the essential link that had shown that the prosecution's version of the events was to be preferred when compared to the version of the appellant's. We find that conclusion to be a correct one.

[56] We note that the learned trial judge had come to the finding of facts on the credibility of PW2 and PW4 at pp 321–322 of the ROA and he had observed as follows at para 73: 'There was nothing to establish that PW2 and PW4 were not telling the truth when they testified that they saw the accused walking at the side of the road at Taman Gilbert with the dark blue bag slung from the right shoulder and had ran into the house when they approached him in the MPV. Both PW2 and PW4 did not know the accused. There was no evidence to show that they had any grudge against him. There was no evidence that they intended to frame the accused or to cause any harm to him and no reason had been suggested why they should do so. There was no reason for them to lie about seeing the accused walking at the side of the road with the dark blue bag slung from his right shoulder, that the accused had run into the house when the MPV approached him, that when they entered the house they saw the lady with the child who turned out to be the accused's mistress and child, that they asked her about a Chinese male with a dark blue beg and she told them that he was staying in a room upstairs in the house.' In this regard, the learned trial judge had the audio visual advantage of having seen and observed the demeanour of the witnesses who had appeared and testified before him and he had accepted the evidence of PW2 and PW4 as credible evidence and had acted on such evidence accordingly in the manner he did. We find that there is nothing wrong in him doing that that would have warranted our intervention. Likewise, he had accepted the evidence of other prosecution witnesses as credible.

[57] From a perusal of the evidence, we are satisfied that the learned trial judge had not erred in coming to his conclusion on the ultimate guilt of the appellant on both the charges that were preferred against him. The appellant's line of defence had been that he had nothing to do with the drugs found in the dark blue bag (P12). He therefore denied possession. Had he succeeded, he

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

would have to be acquitted of both the charges. As such, he had not led any rebuttal evidence to address the presumed trafficking, which was in play in this case. Lord Diplock's speech on this point in the *Ong Ah Chuan*'s case is highly relevant. We say that such a defence employed by the appellant was a very brave defence indeed, but the inherent risk that had come with it was equally high. The learned trial judge had directed himself within the dictates of the law. At p 320 of the record of appeal, the learned trial judge had clearly stated that following the legal directions as enunciated in the cases of *Mat v Public Prosecutor* [1963] 1 MLJ 263 and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, it was incumbent on him to still consider the defence as offered by the appellant and assess the truth or otherwise of the defence and to look whether it had raised any reasonable doubt in the prosecution's case. Although he had said that the appellant had not put the various factual circumstances to the relevant prosecution witnesses during their cross-examination, he did not as a matter of course, reject the defence of the appellant outright on such account. He was aware of the rule on cross-examination that, subject to certain exceptions, failure to cross-examine a witness on a crucial part of a case will amount to an acceptance of the witness's testimony as contained in the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212. The learned trial judge had observed during the defence stage, that the appellant did not put to the PW2 during cross-examination of the latter that PW2 had taken yellow packets from the Toyota car during the search at Miri City Fan that he subsequently put into the dark blue bag before coming back to the MPV that they were travelling in on the way to the Miri Central Police Station on that day. This evidence of the appellant could be seen at p 248 of the ROA (Vol 2). This is a crucial point. It is smack of a fix up by the PW2 on him. In fact, the appellant had testified during his examination-in-chief that the PW2 had taken only a transparent plastic packet that had contained green leaves from the dark blue bag when he did the search inside his room at house No 31 Taman Gilbert, Miri as could be seen at p 246 of the ROA (Vol 2). None of these scenarios was put to PW2 during his cross-examination who had testified that during the search in the appellant's room he had taken out from the dark blue bag all the impugned drugs as described by him. We need only refer to the case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 to remind ourselves of the implications of such a course of action. In that case, Mukerji J had this to say:

> The law is clear on the subject. Wherever the opponent has declined to avail himself to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

A each of his opponent's witness in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has no further chance to meet the new case made which was never put and
B secondly, because such subsequent testimony has no chance of being tested and corroborated.

[58] Despite all these, the learned trial judge had proceeded to consider the defence in the context of the whole evidence before him before he came to his
C conclusion on the effect of defence case on the prosecution case. Only after considering the evidence as led by the appellant and his witnesses, did the learned trial judge make the finding that the appellant had failed to raise a reasonable doubt as regards his possession of the drugs and that he had also failed to rebut the presumption of trafficking under s 37(da) of the DDA 1952.
D And neither had the appellant raised a reasonable doubt as to his guilt, according to the learned trial judge. This ultimate finding by the learned trial judge can be found in his grounds of decision at p 324 in the records of appeal where he had said: 'From the evidence before the court, the accused had not
E rebutted the finding that he had mens rea possession of the drugs. The accused had also not rebutted the presumption under s 37(da) that he was trafficking the drugs. I find that his explanation did not raise a reasonable doubt as to his guilt. I am aware of the fact that the onus of proving his guilt lies throughout on the prosecution. Looking at the totality of the evidence before the court I
F am satisfied beyond reasonable doubt as to the accused's guilt.' We find that he had not misdirected himself in law on how to properly appreciate the defence and its impact, at the end of the whole case.

[59] In the final analysis, it is our considered view that on the totality of the
G evidence and the appreciation of it by the learned trial judge, the convictions as entered and recorded by him against the appellant had been premised on sound consideration and correct application of the applicable legal principles to the factual circumstances as obtaining in this case. As such, we are of the view that
H that it is therefore safe to sustain the convictions entered by him against the appellant on both charges. We therefore see no reason whatsoever to disturb or interfere with his decisions in any way. It does not require any curial intervention on our part. This appeal is hereby dismissed and the convictions entered against and the sentences imposed on the appellant, in respect of the
I two charges, are hereby affirmed.

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Wed Nov 26 11:54:16 2014

Appeal dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar